IN THE SUPREME COURT OF THE
UNITED STATES

Supreme Court, U. S.
FILED
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_____ TERM _____

_____ NO. 79-729

ERNEST M. MILLICAN, JR., Petitioner

VS

UNITED STATES OF AMERICA, Respondent

PETITION FOR COMMON LAW WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT
AND
ASSERTION FOR SUMMARY REVERSAL

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Petitioner, Ernest M. Millican, Jr., urges the Supreme Court of the United States to issue a Common Law Writ of Certiorari and grant Summary Reversal of the Judgement of the United States Court of Appeals for the Fifth Circuit with regard to the affirmation of a Criminal Conviction rendered on August 2d, 1979, and subsequent denial of Rehearing ordered on October 9th, 1979.

OPINION BELOW

The opinion of the United States Court for the Fifth Circuit is unreported and appears at Appendix A hereto. No opinion was rendered by the trial court, the United States District Court for the Northern District of Texas, Fort Worth Division.

JURISDICTION

The judgement of the Fifth Circuit affirming the criminal conviction in the Federal District Court was filed on August 2d, 1979. A timely Petition for Rehearing was denied on 9 October, 1979. This Petition for Certiorari was filed within thirty days of that date. The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a Federal District Court may lawfully force a defendant in a criminal prosecution to trial without Jurisdiction acquired by the ascertainment of probable cause supported by Oath or Affirmation.

(a) Whether a summons issued instead of a warrant upon an information unsupported by Oath or Affirm-

ation may be lawfully used to institute a criminal prosecution over the objections of the defendant as to the trial court's Jurisdiction.

(b) Whether such a summons, under the circumstances of the Millican case, carries the same Constitutional requirements as a warrant of arrest.

(c) Whether the ultimate conviction of a defendant furnishes probable cause ex post facto thereby satisfying the Fourth Amendment requirements refused to the defendant prior to trial.

(2) Whether a defendant in a criminal tax prosecution for wilful failure to file is entitled to a jury instruction on the impact of the Garner decision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CONSTITUTION OF THE UNITED STATES, AMENDMENT IX:
The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

RULE 4(a), FEDERAL RULES OF CRIMINAL PROCEDURE
ISSUANCE. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

RULE 7(a), FEDERAL RULES OF CRIMINAL PROCEDURE
USE OF INDICTMENT OR INFORMATION. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

RULE 9(a), FEDERAL RULES OF CRIMINAL PROCEDURE
ISSUANCE. Upon the request of an attorney for the government the court shall issue a warrant

for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the governemnt or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshall or other person authorized by law to execute or serve it. If a defendant fails to appear in response to a summons, a warrant shall issue.

TITLE 26 UNITED STATES CODE, SECTION 7203
Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF FACTS

For the taxable year 1975, Ernest M. Millican, Jr., executed and mailed to the Internal Revenue Service a form 1040 Income Tax Return upon which he asserted the Fifth Amendment Privilege in response to each individual question on the return.

On January 5th, 1978, a criminal information

was filed by the United States Attorney for the Northern District of Texas charging the defendant, Ernest M. Millican, Jr., with receiving $13,316.64 in gross income during 1975 and wilfully failing to file a federal income tax return for that year in violation of 26 USC 7203. The information contained only a brief statement of the facts underlying the crime charged, and the signatures of the United States Attorney and assistant. The Information was unsupported by Oath or Affirmation.

On the same day, the clerk of the United States District Court for the Northern District of Texas, Fort Worth Division, issued a summons which directed Millican to appear before the District Court on January 13th, 1978, and answer the charge set forth in the information. A United States Marshall personally served the summons upon Millican on January 10th, 1978, at his residence in Arlington, Texas, located in the Northern District of Texas. Prior to appearing in Court, Millican filed a Notice of Special Appearance challenging the Jurisdiction of the Court and refusing to make any general appearances. Millican was present

in Court on January 13th upon the special appearance for arraignment. Millican at no time challenged the constitutionality of the income tax.

Millican being without counsel, arraignment was continued to January 23d, 1978, at which time Millican appeared specially, refused to enter a plea and challenged the jurisdiction of the Court to prosecute him without ascertaining probable cause. In a document filed prior to arraignment and entitled "Motion to Dismiss for Lack of Probable Cause" Millican challenged the constitutionality of the summons issued instead of a warrant, upon an information unsupported by Oath or Affirmation and used to compel his appearance under threat of arrest. The District Court refused to take Millican's constitutional assertions seriously and entered a plea of not guilty for Millican, over Millican's objections.

On March 1st, 1978, Millican filed an additional challenge to the Court's jurisdiction styled "Notice and Petition for Order to Show Cause or an Order to Dismiss for lack of Probable Cause" in which Millican once more denied the Constitutionality of the summons

and demanded a probable cause hearing. All motions were denied by the District Court in a hearing on March 8, 1978, Judge Eldon B. Mahon presiding.

The case continued to trial before the senior district judge, Joe E. Estes, on May 15, 1978, with Millican represented by an attorney of his own choosing.

In his requested jury instruction no. 15, Millican requested an instruction based upon the impact of this Court's decision in United States vs Garner, 424 US 648, 96 S Ct 1178, which instruction the trial court refused.

Millican was convicted by the jury and the Court ordered him to post a $2000 surety bond pending imposition of sentence. On June 6, 1978, the defendant was sentenced to one year of incarceration.

Millican filed Notice of Appeal and docketed same with the United States Court of Appeals for the Fifth Circuit. On appeal, Millican assigned error to the same issues presented herein, among others.

The opinion of the Fifth Circuit in affirming the conviction, discussed the issue of whether or

not the summons, when viewed in the circumstances of this case, carried the same constitutional requirements as a warrant of arrest but did not state a direct conclusion on that point. The Court's opinion states instead that even though the 4th Amendment demands ascertainment of probable cause and same was denied to Millican over his repeated objections, this was not harmful to Millican since his subsequent conviction provided probable cause ex post facto. See Appendix A, United States v Millican, no.78-5395 (5th Cir 2 Aug, 1979), at pages 6628 through 6630.

The opinion of the Fifth Circuit further denies that Millican was entitled to a charge to the jury on the impact of this Court's decision in Garner, supra. See Millican, supra, at page 6630.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's stated opinion in Millican that probable cause is furnished ex post facto by the ultimate conviction of the defendant is contrary to the 4th Amendment to the United States Constitution as interpreted by this Court in United States vs

Morgan, 222 US 274,282, 32 S Ct 81,82, 56 L Ed 198; and United States vs Thompson, 251 US 407,410, 40 S Ct 289, 64 L Ed 333.

> "It was argued that the privilege of a preliminary hearing was granted so as to prevent malicious prosecutions. But, had such been its intention, the statute would have required that a hearing should be given to all persons charged with a violation of the act, and not merely to those from whom the sample was received. A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unles it is supported by the oath of someone having knowledge of the facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses under oath, by grand jurors..." Morgan, supra.

The opinion of the Court below is so far contrary to the accepted meaning of the 4th Amendment and to this Court's opinions interpreting same that it is necessary for the Supreme Court to exercise its power of supervision over the Fifth Circuit and prevent the further sanctioning of lawlessness in the lower courts.

The opinion below is further untenable because, first and foremost, the trial court could not have acquired jurisdiction over the person unless and until such time as there was some showing of probable cause.

Since there was no oath or affirmation on the summons, which is, in this instance an arrest warrant, the trial court had no jurisdiction over the person and no jury convened by such a court could possibly have had jurisdiction to convict.

The result of the Millican opinion, if left unmodified, will be an assertion by the executive that it has the authority to bring a defendant into court by whatever devices it sees fit to utilize and just so long as a conviction is obtained no real harm is done. Such a state of affairs will prove rather precarious to any serious utilization of the Fourth, Fifth and Ninth Amendments by the citizenry at large. It is further apparent that the executive may now imagine itself empowered to engage in whatever abuses of due process it desires with no fear of opposition from the judiciary (or at least the Fifth Circuit)... just so long as a conviction can be acquired and no restrictions as to how.

The opinion of the lower court if left unmodified by this court will most certainly lead to an ex post facto rule in the Fifth Circuit with regard to the

Bill of Rights, id est, the Bill of Rights doesn't apply to defendants convicted and such condition may be retroactively applied to pre-conviction proceedings.

2. There is no Supreme Court opinion on the issue of whether the summons, in these circumstances, carries the same constitutional requirements as a warrant of arrest. The Fifth Circuit opinion on this point is in conflict with the Ninth Circuit's opinion in United States vs Greenberg, 320 F2d 467, in which that Court stated:

> "It appears to us that insofar as a defendant is concerned, there is but little distinction between the issuance of a warrant or a summons. If he fails to respond to a summons, a warrant of arrest may issue. If he appears in response to the summons, in most instances he is required to post bail or suffer arrest and detention until a determination has been made by the Commissioner in respect to the charges pending against him.
>
> We conclude, under the rationale of Giordenello that the requirement of Rule 4(a), that it must appear from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, is required whether a warrant or summons is issued upon the complaint." Greenberg, supra, at page 472.

Similarly, the Fifth Circuit admits by reference that its holding in Millican is contrary to all noted

and recognized authorities that discuss the issue:

> " May a summons issue on the basis of an information that is not supported by oath? The question is not discussed in the cases. It would seem that the Fourth Amendment would permit a summons to issue in such circumstances, since a summons is not compulsory process, and thus is not a seizure within the meaning of that amendment. But the rule does not appear to contemplate this. The procedure for a summons is set out in the second sentence of Rule 9(a), and speaks of issuing a "summons instead of a warrant." The first sentence allows issuance of a warrant upon an information only "if it is supported by oath." If the information is not supported by oath, no warrant can issue, and there would be no authorization for issuing "a summons instead of a warrant." This conclusion is further supported by the final sentence of Rule 9(a), which provides that if a defendant fails to appear in response to the summons, a warrant "shall issue." If a summons could be issued on an information not supported by oath, and a warrant then issued for failure to appear in response to the summons, the end result would be that defendant would be arrested on warrant though there had never been a showing under oath of probable cause. This is not permissible." 1 Wright, Federal Practice and Procedure, Section 151 at page 342 (1969).

There is mention of this issue in an opinion handed down by this Court in Jaben vs United States, 381 US 214, 85 S Ct 1365, 14 L Ed2d 345, however, the primary subject of that opinion was the tolling of statute of limitations under the Internal Revenue Code and no in depth treatment of the subject is

evident. We quote as follows:

> "Notice to a criminal defendant is usually achieved by service upon him of the summons or arrest warrant provided for in Rule 4. Neither is appropriate absent a judgement by the Commissioner that the complaint shows probable cause, and no other form of notice is specified by the rules." See Jaben, supra.

The summons is the arrest warrant in this instance and commands the same constitutional requirements as a warrant of arrest. The word "shall" as used in the last sentence of Rule 9(a), literally and actually makes of the summons in question a warrant of arrest in circumstances such as those contained in Millican and enumerated above. The word shall is absolutely mandatory and places the probable cause requirement by oath or affirmation squarely upon the summons issued instead of a warrant.

3. The Fifth Circuit's assertion in the opinion below that Millican was not entitled to a jury instruction based upon the impact of Garner vs United States, 424 US 648 is in direct conflict with the Ninth Circuit's opinion in United States vs Foster, no.76-3733 (9th Cir Dec.30, 1977) in which that Court stated:

"Contrary to appellant's contention, Garner does

not prevent prosecution for violation of Section 7203 when taxpayers assert the Fifth Amendment to avoid responding to questions on their tax returns. All Garner does is to permit taxpayers to assert a defense to a Section 7203 charge on the ground that they made a good faith claim of Fifth Amendment privilege.

...Appellants did claim the Fifth Amendment on their 1970 and 1971 returns. The appellants sought a jury instruction based upon the Garner case, which the court rejected in favor of a proposed instruction that the court drew from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 35.31, at 158 (1977). (Our court approved that instruction in Cooley v United States (9th Cir 1974) 501 F2d 1249, 1253.) The problem is that the district court did not give the instruction to the jury. As nearly as we can ascertain from the record, no one noticed the omission when the jury was instructed. The failure to instruct upon the appellants' defense based on Garner and Cooley was plain error, which survives on appeal despite the absence of an appropriate exception in the district court. Accordingly, appellants' convictions on the Section 7203 counts for the years 1970 and 1971 must be reversed." Foster, supra.

As in Foster, the district court failed to give any instruction upon the defense of Millican based on Garner, even refused to do so.

CONCLUSION

The judgement below on the issue of Fourth Amendment probable cause is in conflict with this Court's rulings on that point.

This Court has never ruled directly on the quest-

ion of whether a summons issued instead of a warrant carries the same constitutional requirements as a warrant. All of the points and authorities that can be found (including the opinions of the Ninth Circuit) disagree with the Fifth Circuits holdings in the instant matter of Millican.

The denial of a Garner charge is plain error and the lower courts assertion to the contrary is in conflict with the Ninth Circuit.

THEREFORE Millican contends that it is necessary that this Court exercise its jurisdiction and powers of supervision in order that:

(a) Uniformity of opinion be maintained;

(b) Unlawful proceedings in the lower courts will not be sanctioned; and

(c) A point of law not previously addressed by this Court will be examined.

Thus, the Petition for Common Law Writ of Certiorari should be granted and Summary Reversal entered.

In the event that this Court declines to hear Millican out of time, then Millican urges the Court

to stay the mandate pending application by Millican to this court for Writ of Habeaus Corpus upon the issues herein. This is in the interests of justice in Millican's case since the issues raised will be moot once the sentence is served, said sentence of a year imprisonment being inadequate to sustain a collateral attack.

Respectfully Submitted,

Ernest M. Millican, Jr.

AFFIDAVIT OF SERVICE

I, Ernest M. Millican, Jr., being of sound mind, over 21 years of age and competent to testify do hereby depose and state that I placed in the U.S. Mail this date three copies of the foregoing Petition for Common Law Writ of Certiorari and Assertion for Summary Reversal addressed to M. Carr Ferguson, Assistant Attorney General, Department of Justice, Washington, D.C. 20530; and one copy to the Solicitor General at the same address.

Date: 5 November, 1979

Ernest M. Millican, Jr.

State of Texas
County of Tarrant
Sworn and attested to before me this 5st day of November, 1979.

Notary Public

My Commission Expires 2-14-80.

APPENDIX A, OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED AUGUST 2, 1979,

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

V.

ERNEST M. MILLICAN, JR.,
DEFENDANT-APPELLANT

NO.78-5395
SUMMARY CALENDER

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ernest M. MILLICAN, JR.,
Defendant-Appellant.

No. 78-5395

Summary Calendar.*

United State Court of Appeals,
Fifth Circuit.

Aug. 2, 1979.

Defendant was convicted before the United States District Court for the Northern district of Texas, Joe Ewing Estes, J., of willfully failing to file a federal income tax return, and he appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) although denial of defendant's request for a probable cause hearing was improper, in that defendant

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et. al., 5 Cir. 1970, 431 F.2d 409, Part I.

appeared in response to summons issued on an unverified information, such did not require reversal of conviction; (2) statute requiring filing of an income tax return was not unconstitutional for vagueness, and (3) judge did not improperly poll jury by asking, "Is this your verdict and the verdict of the jury?" when, in response to poll, one juror answered "It's the verdict of the jury."

Affirmed.

1. Criminal Law key 1166(1)

Although it was improper to deny request for probable cause hearing as made by defendant who appeared in court in response to a summons issued pursuant to information that had not been verified or supported by affidavit, such impropriety does not permit reversal of conviction of wilfully failing to file a federal income tax return. 26 U.S.C.A. (I.R.C. 1954) Sec. 7203; Fed. Rules Crim. Proc. rule 9, 18 U.S.C.A.

2. Criminal Law key 99

Defects in the procedure through which a defendant is brought before the court do not vitiate a subsequent conviction.

3. Indictment and Information key 4

Offense of wilfully failing to file a federal income tax return, being a misdemeanor punishable by not more than one year's imprisonment, is properly charged by information rather than indictment. 26 U.S.C.A. (I.R.C. 1954) Sec. 7203; Fed. Rules Crim. Proc. rule 7(a,c), 18 U.S.C.A.

4. Indictment and Information key 41(1)

A probable cause determination is not a constitutional prerequisite to filing of an information.

5. Criminal Law key 217

A showing of probable cause is required by the Fourth Amendment where the information is the basis for an arrest warrant. U.S.C.A.

Const. Amend. 4.

6. Criminal Law key 224

Although a summons, rather than a warrant may be used to secure the defendant's appearance to answer charges in an unverified information, a defendant should not have to disobey a summons to obtain a probable cause hearing; it is highly desirable for district courts to establish, where it is challenged, that the Government has probable cause supported by oath before putting any defendant to trial. Fed. Rules Crim. Proc. rules 4, 9 (a), 18 U.S.C.A.

7. Criminal Law key 1166(1)

Although defendant may not have waived any defects of process, i.e., failure to hold probable cause hearing, by appearing on summons rather than forcing his arrest by nonappearance, especially since defendant made persistent efforts to obtain a probable cause determination, conviction could not be overturned on such basis. Fed. Rules Crim. Proc. rules 4, 9(a), 18 U.S.C.A.

8. Internal Revenue key 2459

Defendant charged with wilfully failing to file a federal income tax return, was not entitled to jury instruction that his claim of Fifth Amendment privilege against disclosing his income on a tax return was to be considered by the jury as a proper defense. 26 U.S.C.A. (I.R.C. 1954) Sec. 7203; U.S.C.A. Const. Amend. 5.

9. Internal Revenue key 2459

Defendant, charged with wilfully failing to file a federal income tax return, was not entitled to an instruction that the Internal Revenue Service was under a duty to prepare his tax return. 26 U.S.C.A. (I.R.C. 1954), Sec. 6020(b)(1), 7203.

10. Criminal Law key 1038.1(3)

Instruction, given in prosecution for

wilfully failing to file a federal income tax return, limiting jury's review of the law under which it was to base its verdict to the court's instructions on the law was proper and was not plain error. 26 U.S.C.A. (I.R.C. 1954) Sec. 7203; Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C.A.

11. Criminal Law key 655(1)

Trial judge's opening statement that defendant, charged with wilfully failing to file federal tax return, did not file a return according to law was not erroneous since it was merely a clarification of a statement made by the prosecutor, and no prejudice resulted. 26 U.S.C.A. (I.R.C. 1954) Sec. 7203.

12. Criminal Law key 874

Trial judge did not improperly poll the jury where in response to poll one juror answered"it's the verdict of the jury" and following defense counsel's request for clarification the trial judge asked, "Is this your verdict and the verdict of the jury?"; record revealed that juror did not indicate uncertainty and the judge merely sought a responsive answer to the poll.

13. Criminal Law key 700

Examination of the record revealed that the W-2 forms and other forms which taxpayer claimed the Government destroyed were not needed in connection with his conviction for wilfully failing to file a federal income tax return, nor did they contain any exculpatory information. 26 U.S.C.A. (I.R.C. 1954) Sec. 7203.

14. Internal Revenue key 2402

Statute requiring the filing of an income tax return is not unconstitutional for vagueness. 26 U.S.C.A. (I.R.C. 1954) Sec. 7203.

Appeal from the United States District Court for the Northern District of Texas.

Before RONEY, GEE and FAY, Circuit Judges.

RONEY, Circuit Judge:

Defendant Ernest Millican was convicted after a jury trial of wilfully failing to file a federal income tax return in violation of the Internal Revenue Code, 26 U.S.C.A. Sec. 7203, and sentenced to one year in prison. His pro se appeal argues several points.

[1,2] Among other things, the defendant argues he was denied a pretrial showing of probable cause because he appeared in court in response to a summons rather than an arrest warrant, and that the court never conducted a probable cause hearing before trial, although he requested one. Although the denial of defendant's request for a probable cause hearing was improper, it does not permit reversal of his conviction. The law appears to be clear that defects in the procedures through which defendant was brought before the court do not void his subsequent conviction. See Gerstein v. Pugh, 420 U.S. 103, 119, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (Conviction will not be vacated on ground defendant was detained pending trial without determination of probable cause) Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952) (Defendant alleged forcible abduction in violation of Federal Kidnapping Act); United States v. Lopez, 542 F.2d 283 (5th Cir. 1976) (Defendant returned to United States by FBI after torture and interrogation by Dominican Republic authorities, allegedly at instigation of United States); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974) (Defendant alleged illegal arrest, abduction and extradition from Peru).

As a matter of practice, however, defendant should have been afforded a probable cause hearing.

In January 1978 a criminal information was filed against defendant Ernest Millican

by the United States Attorney for the Northern District of Texas. The information charged defendant with wilfully failing to file a federal income tax return for tax year 1975 in violation of the Internal Revenue Code, 26 U.S.C.A. Sec. 7203. The information was neither verified nor supported by affidavit. It contained a brief statement of the facts underlying the crime charged and was signed by the United States Attorney and an assistant United States Attorney.

Pursuant to Rule 9, Fed. R. Crim. P., the clerk of the district court issued and a United States marshal personally served a summons which directed defendant to appear before the court and answer the charge set forth in the information. The day before defendant scheduled arraignment he filed papers entitled "Defendant's Special Appearance" challenging the court's jurisdiction to hear the case and moved for a Bill of Particulars.

After the arraignment, defendant, proceeding without counsel, filed a motion to dismiss the information for lack of probable cause becuase it was not supported by oath attesting that a crime had been committed. Further, defendant filed a "Notice and Petition for Order to Show Cause or an Order to Dismiss for Lack of Probable Cause," reasserting his challenge to the validity of the unsworn information and alleging that the summons failed because it was unsupported by oath or affirmation. In addition defendant filed a Motion to Dismiss for Denial of Due Process complaining of the denial of a hearing and proof of probable cause. All of defendant's motions were denied by the district court. No application for warrant of arrest of defendant was ever sought. From the record it appears that at no time before trial did the Government ever make a sworn showing of probable cause. Defendant was never taken into custody and remains free on bail pending the

outcome of this appeal.

(3) The crime with which defendant was charged, a misdemeanor punishable by not more than one year's imprisonment, is properly charged by information rather than indictment. United States v. Kahl, 583 F.2d 1351, 1355 (5th Cir. 1978); Fed. R. Crim. P. 7(a). The information here, as required by Rule 7(c), Fed, R. Crim. P., contained a "plain, concise and definite written statement of the essential facts constituting the offense charged" and was signed by the Government's attorney.

The information, as originally used in Great Britain, was a formal accusation which the King could make in his courts without any evidence and against all evidence. United States v. Tureaud, 20 F. 621, 622 (5th Cir. 1884). As prosecution by information became accepted practice in this country, courts disagreed over the need for probable cause supported by oath or verification in a valid information. Compare United States v. Tureaud, 20 F. at 622; United States v. Morgan, 222 U.S. 274, 282, 32 S. Ct. 81, 56 L. Ed. 198 (1911); United States v. Kennedy, 5 F.R. D. 310, 312 (D. Colo. 1946), with Weeks v. United States, 216 F. 292, 298 (2d Cir. 1914). See also Albrecht v. United States, 273, U.S. 1, 6 n. 2, 47 S. Ct. 250, 71 L. Ed. 505 (1927). This Court and others required the support of an oath or verification only where the information was made the basis for an application for an arrest warrant. Christian v. United States, 8 F. 2d 732 (5th Cir. 1925); Keilman v. United States, 284 F. 845 (5th Cir. 1922). The significance of decisions that no verification was needed may have been reduced by the fact that filing of informations required leave of the court and before granting leave the court had to satisfy itself that probable cause existed for the prosecution. See Albrecht v. United States, 273 U.S. at 5, 47 S. Ct. 250; Orfield, Warrant of Summons Upon

Indictment or Information in Federal Criminal Procedure, 23 Mo. L. Rev. 308, 327 (1958). Rule 7(a), Fed. R. Crim. P., now permits filing of an information without leave of court.

[4.57] A probable cause determination is not a constitutional prerequisite to filing of the information itself, Gerstein v. Pugh, 420 U.S. at 125 n. 26, 95 S. Ct. 854, nor have the Federal Rules of Criminal Procedure, in effect since 1946, been construed to require probable cause in an information in order to state a prosecutable offense. See United States v. Funk, 412 F. 2d 452, 455 (8th Cir. 1969); United States v. Pickard, 207 F. 2d 472, 474-475 (9th Cir. 1953). A demonstration of probable cause is required by the Fourth Amendment, of course, where the information is the basis for an arrest warrant. Albrecht v. United States, 273 U.S. at 5, 47 S. Ct. 250.

Rule 9(a) Fed. R. Crim. P., provides for the process used to secure defendant's appearance, and provides:

> Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, it if is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

Professor Wright has concluded that since a summons may issue "instead of a warrant," and a warrant may issue only on a sworn information, then a summons may issue

only on a sworn information.

The procedure for a summons is set out in the second sentence of Rule 9(a), and speaks of issuing a "summons instead of a warrant." The first sentence allows issuance of a warrant upon an information only "if it is supported by oath." If the information is not supported by oath no warrant can issue, and there would be no authorization for issuing "a summons instead of a warrant." This conclusion is further supported by the final sentence of Rule 9(a), which provides that if a defendant fails to appear in response to the summons, a warrant "shall issue." If a summons could be issued on an information not supported by oath, and a warrant then issued for failure to appear in response to the summons, the end result would be that defendant could be arrested on warrant though there had never been a showing under oath of probable cause. This is not permissible.

1 Wright, Federal Practice and Procedure, Sec. 151 at 342 (1969).

The same conclusion was drawn in United States v. Greenberg, 320 F. 2d 467, 471 (9th Cir. 1963), from a similar analysis of the language of Rule 4, Fed. R. Crim. P., which provides for issuance of summons and warrants upon a complaint, rather than an information. A summons on a complaint may involve a higher degree of restraint than one on an information since if a defendant appears in response to the complaint he is likely to be required to post bail or suffer arrest and detention until a decision has been made on charges pending against him. See United States v. Greenberg, 320 F. 2d at 471. See also 8 Moore's Federal Practice, Paragraph 4.05(1) at 4-32 (2d ed. 1978).

In this case the Government asserts that, although the rule provides that a warrant shall issue if the defendant fails to appear under the summons, a warrant for arrest will

issue only after the court satisfies itself that probable cause exists for prosecution and the necessary oath is made. We have serious reservations as to whether this happens in practice. The Government's case support, United States v. Evans, 574 F. 2d 352 (6th Cir. 1978), is inapposite because there the warrants under which the defendant was arrested were issued under a statute stating that upon disobedience of an "appearance ticket" under a complaint, the court may issue a warrant "based upon the complaint filed." Furthermore the form signed by the judge to order the warrants stated they were to be based on the complaint as did the warrants themselves. See United States v. Greenberg, 320 F. 2d at 471. Cf. Rule 4, Federal Rules of Procedure for Trial of Minor Offenses before United States Magistrates.

/6/ Even if the Government's assertion is accurate, however, or because it is accurate, a probable cause determination should also be made on the request of a defendant who responds to a summons. The summons, although not equal in physical restraint to a Rule 9 warrant carries considerable compulsion. Most persons would feel compelled to respond to a summons, as well they should. For the defendant who is subsequently found guilty beyond a reasonable doubt, there is really no harm. It would be strange indeed if evidence sufficient to convict were found to be insufficient for probable cause. It is the defendant who is acquitted who suffers if no probable cause under oath could have been furnished by the Government if it had been required before trial. That defendant has been required to suffer a trial that should not have occurred in the first place. Such a defendant should not have to disobey a summons to trigger a probable cause hearing. It is highly desirable for the district courts to establish, where it is challenged, that

the Government has probable cause supported by oath before putting any defendant to trial.

/7/ The Government argues that by appearing on the summons rather than forcing his arrest by nonappearance, defendant waived any defects of process. The defendant made persistent efforts to obtain a probable cause determination. He should have had one, or the information should have been verified. Having now been convicted beyond reasonable doubt, however, he cannot upset that conviction on the argument that no probable cause was shown prior thereto.

Millican attacks his conviction on a number of other grounds: improper jury instruction, failure to provide a fair trial and the use of an information to charge him with failure to file an income tax return in violation of 26 U.S.C.A. Sec. 7203.

/8-10/ Millican argues he was entitled to a jury instruction that his claim of Fifth Amendment privilege against disclosing his income on a tax return was "to be considered by (the jury) as a proper defense against the charge of wilful failure to file . . . ." United States v. Johnson, 577 F. 2d 1304, 1310 (5th Cir. 1978), however, held rejection of a similar jury charge proper. See United States v. Wade, 585 F. 2d 573, 574 (5th Cir. 1978). There is no merit to Millican's claim of entitlement to an instruction that the Internal Revenue Service was under a duty pursuant to 26 U.S.C.A. Sec. 6020 (b)(1) to prepare his tax return. United States v. Harrison, 30 A.F.T.R. 2d Paragraph 72-5104 (E.D.N.Y. July 12, 1972), aff'd 486 F. 2d 1397 (2d Cir. 1972), cert. denied, 411 U.S. 965, 93 S. Ct. 2144, 36 L. Ed. 2d 685 (1973). An instruction to which Millican did not object at trial, that limited the jury's view of the law upon which it was to base its verdict to the court's instructions on the law was proper and not plain error. Fed. R.

Crim. P. 52(b); Wilton v. United States, 156 156 F. 2d 433, 435 (9th Cir. 1946). See United States v. Rodriguez, 375 F. Supp. 589, 595-596 n. 2 (S.C.Tex.), aff'd, 497 F. 2d 172 (5th Cir. 1974).

[1-13] Challenging the fairness of the trial, Millican claims a number of errors. His attack on the trial judge's opening statement that Millican did not file a return according to law is without merit. Review of the record shows the judge's statement was a clarification of a statement made by the prosecutor, and no prejudice resulted. Millican's complaint that the trial judge polled the jury improperly is also meritless. In United States v. Sexton, 456 F. 2d 961 (5th Cir. 1972) cited by Millican, the trial judge forced a juror who had expressed uncertainty to arrive at a verdict in open court. In the instant case a juror, in response to the poll, answered "It's the verdict of the jury." Following defense counsel's request for clarification, the trial judge asked, "Is this your verdict and the verdict of the jury?" The record shows, the juror did not indicate uncertainty, and the judge merely sought a responsive answer to the poll. No error was committed. See United States v. Duke, 527 F. 2d 386, 394 (5th Cir.), cert. denied, 426 U.S. 952, 96 S. Ct. 3177, 49 L. Ed. 2d 1190 (1976). Examination of the record shows the W-2 forms and other forms Millican claims the Government destroyed were not needed in connection with his conviction, and they did not contain allegedly exculpatory information.

[14] Review of Millican's other challenges to the fairness of the trial reveals no error. Contrary to Millican's assertions, 26 U.S.C.A. Sec. 7203 requiring the filing of an income tax return is not unconstitutional for vagueness, United States v. Lachmann, 469 F. 2d 1043, 1046 (1st Cir. 1972), cert. denied

411 U.S. 931, 93 S. Ct. 1897, 36 L. Ed. 2d 390 (1973); United States v. Ming, 466 F. 2d 1000, 1004 (7th Cir.), cert. denied, 409 U.S. 915, 93 S. Ct. 235, 34 L. Ed. 2d 176 (1972), and this Court has held an information instead of an indictment can be used to charge a defendant with failure to file an income tax return in violation of 26 U.S.C.A. Sec. 7203. United States v. Kahl, 583 F. 2d at 1355.

AFFIRMED.